Supreme Court, U.S.
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No. 01-552

In The

Supreme Court of the United States

DELBERT LEAVITT, JR., ET AL.,

Petitioners,

versus

CITY OF EL PASO,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Is there any summary judgment evidence presented by the Petitioners that would show, or even suggest, that the Respondent, The City of El Paso ("City") maintained a custom or policy of violating the civil rights of the Petitioners or any other citizen? In addition, is there any conduct on behalf of City employees that constitutes a waiver of the City's sovereign immunity from tort liability?

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CITATIONS OF OPINIONS AND JUDGMENTS BELOW

The opinions and judgments of the United States District Court and Fifth Circuit Court of Appeals are contained in Petitioners' Appendix to their Petition for Writ of Certiorari. All references by respondent in its opposition brief will be to those contained in Petitioners' Appendix.

STATUTES NOT CONTAINED IN PETITIONERS' WRIT

A governmental unit in the state is liable for:

(1) property damage, personal injury, and death proximately caused by the wrongful act or omission or negligence of an employee . . . if:

(A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle . . . and

(B) the employee would be personally liable to the claimant according to Texas law; and

(2) personal injury and death so caused by a condition or use of tangible personal or real property. . . . Tex. Civ. Prac. & Rem. Code § 101.021.

This chapter [waiver of immunity provisions] does not apply to a claim arising:

(3) from the failure to provide or the method of providing police or fire protection. Tex. Civ. Prac. & Rem. Code § 101.055(3).

STATEMENT OF THE CASE

The factual summary set out by the petitioners is chronologically correct; however, there are some misleading or exaggerated portions, too numerous to enumerate here. As an alternative, the respondent incorporates the trial court's summary of facts, as stated in the judgment of July 10, 2000. (Petitioners' appendix, pp. 5a-8a).

SUMMARY OF ARGUMENT

Under any theory of law, there is no evidence that the City promulgated an unconstitutional custom or policy directed at the petitioners or those similarly situated. There is no "state-created danger" exception to the basic principle of law that the Constitution does not require the police to affirmatively protect an individual from the acts of third parties. In addition, there is no waiver of the City's governmental immunity, nor is there any other cause of action which could implicate the City in the death of Mrs. Alvarado at the hands of her deranged husband.

ARGUMENT

A. Due Process/The Right to Police Protection

1. Constitutional Violation

A logical starting point in any § 1983 analysis is the determination of what, if any, constitutional rights have been violated and, logically, who may have violated them, if at all. *Piotrowski v. City of Houston*, 51 F.3d 512, 515 (5th Cir. 1995). In the arena of police protection, this Court has held that the government's failure to protect a person against private violence – that is, violence by a third, non-governmental party – simply does not constitute a violation of the due process clause. *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 192-96, 103 L. Ed. 2d 249, 109 S.Ct. 998 (1989).

The Constitution does not require police to affirmatively protect life or liberty against the acts of third parties, but it only serves as a buffer between the state and the individual. There is, then, no constitutional protection against crimes committed by criminals or madmen. *Id.*, 489 U.S. at 195-196.

2. The "Special Relationship" Theory as Exception

When the government imposes restraints – that is, imprisonment, institutionalization, or temporary custody – there *may* exist a "special relationship" and, by extension, a greater duty to protect. *DeShaney*, 489 U.S. at 202; *Piotrowski*, 51 F.3d at 515. But, here, there is no evidence that Mrs. Alvarez was ever confined, nor that the City police took her into protective custody, and such an exception would not apply.

3. The "State-Created Danger" Theory as Exception

Another exception to the general police-protection rule – and one gaining limited, conversational popularity, but not widespread judicial acceptance – is the idea of the "state-created danger" theory of constitutional violation. But to recognize such a broad and ill-defined exception would be, according to the Court of Appeals for the Fourth Circuit, the "first step down the slippery slope of liability" where

> [e]very time a police officer incorrectly decided it was not necessary to intervene in a domestic dispute, the victims of the ensuing violence could [sue]. . . . Indeed, victims of virtually every crime could plausibly argue that if the authorities had done their job, they would not have suffered their loss. *Pinder v. Johnson*, 54 F.3d 1169, 1178 (4th Cir. 1995), *cert. denied*, 516 U.S. 994 (1995).

With the particular facts of this case, no state-created danger ever existed but, even if such a theory were viable, a potential plaintiff must show, in addition to other elements, that the government acted with "deliberate indifference" in failing to protect one from danger – a very high and difficult standard. *Piotrowski*, 51 F.3d at 515-16, n.8; *Leffall v. Dallas Independent School District*, 28 F.3d 521, 530-31 (5th Cir. 1994). Specifically, plaintiffs must show that (1) the environment created by the City police was dangerous; (2) the police knew it was dangerous; and (3) the police used their authority to *create an opportunity* that would not otherwise have existed for the murder to have occurred. *Johnson v. Dallas Independent*

School District, 38 F.3d 198, 200-01 (5th Cir. 1994), *cert. denied*, 514 U.S. 1017 (1995).

In addition, the state-created danger theory of liability is invalid without the presence of a "known victim." *Saenz v. Heldenfels Bros.*, 183 F.3d 389, 391 (5th Cir. 1999). In *Saenz*, this court held that an officer's decision not to arrest a drunk driver (who later caused the deaths of two individuals) did not implicate due process considerations, and went on to say that the Fourteenth Amendment should not be "a font of tort law to be superimposed upon whatever systems may already be administered by the states." *Id.*

B. Texas Family Violence Prevention Act

Petitioners argue that the Texas Family Violence Prevention Act, Art. 5.01 et seq. of the Texas Code of Criminal Procedure mandates or creates a legal duty of police officers to give "maximum protection" to victims of domestic violence, and imposes a duty to arrest perpetrators of domestic violence. A thorough reading, however, of the statute imposes no such duty on police officers, and it does not impose the legal obligation, and concomitant constitutional violation, claimed by the Petitioners. Tex. Crim. Proc. Code Ann., Art. 5.04(a), 14.03(a).

C. Equal Protection

The Court of Appeals for the Fifth Circuit has held that the general principle in *DeShaney* – that is, that there is no constitutional right to police protection – should not

be so easily circumvented "by converting every Due Process claim into an Equal Protection claim, via an allegation that state officers exercised their discretion to act in one incident but not in another." *McKee v. City of Rockwall*, 877 F.2d 409, 413 (5th Cir. 1989).

To properly prove an equal protection claim, plaintiffs must show that the failure to arrest is a discriminatory policy directed at a protected class, and there must be some probative, substantial evidence of that policy, not, simply, the officers' distaste for certain types of arrests or the plaintiff's statistical summaries. Further, the Petitioners must first establish that others similarly situated were treated differently. Trial Court Opinion p. 12; *McKee*, 877 F.2d at 415-16; *Wheeler v. Miller*, 168 F.3d 241, 251 (5th Cir. 1999).

Here, as in *McKee*, this was never done, and there is no hard, clear evidence of a discriminatory policy directed by the City at a protected class, and that failure renders all else immaterial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986).

D. Municipal Custom or Policy

Under any theory of civil rights law, a municipality can *only* be held liable if the action that is alleged to be unconstitutional implements or executes a *municipal policy or custom* that is the "moving force" of the violation. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L. Ed. 2d 611 (1978); *Board of the County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. 397, 137 L. Ed. 2d 626, 630, 117 S.Ct. 1382, 1388

(1997). Importantly, a single or random incident of unconstitutional behavior will not create policy or hold a municipality liable under *Monell, City of Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S.Ct. 2427, 85 L. Ed. 2d 791 (1985). Accordingly, municipal bodies cannot be held liable under the theory of *respondeat superior*, so to be subject to any liability, the governmental body itself must have acted wrongly. *Monell*, 436 U.S. at 691; *Rodriguez v. Avita*, 871 F.2d 552, 554 (5th Cir. 1989). "Where the city is sought to be held liable on the basis of actions by low-level employees such as those of [a police officer] . . . these must be shown to have been carried out in obedience to overall municipal custom or policy." *Rodriguez*, 871 F.2d at 554. "Isolated violations," or particular "shotgun" facts of one claimant's case, or bald assertions and conclusory allegations, do not establish the requisite proof of municipal policy or custom of constitutional deprivations. *Campbell v. City of San Antonio*, 43 F.3d 973, 977 (5th Cir. 1995).

In order to prevail upon the theory of inadequate training or supervision, a plaintiff must show that there existed an identifiable and *deliberately indifferent* policy; that is, a continuing widespread persistent pattern of unconstitutional misconduct, with deliberate indifference by the municipality's policy makers, and that this custom or policy was the moving force behind the constitutional violation. *City of Canton v. Harris*, 489 U.S. 378, 390-92, 109 S.Ct. 1197, 1204 (1989); *Jane Doe "A" v. Special School Dist.*, 901 F.2d 642, 646 (8th Cir. 1990).

There is nothing in the complaint, below, nor in the summary judgment evidence, to suggest any substantive

evidence of a City policy or custom which deprives citizens of their constitutional rights.

E. Causation

The general rule in Texas is that a person does not have a legal duty to control the conduct of third parties, and such a determination is normally a question of law. *Conteq Realty, Inc. v. Siegler*, 894 S.W.2d 195, 197 (Tex. 1995). The duty of a police officer is to the public at large, not to a particular individual, unless a "special relationship" exists between that person and the officer. *Vaquera v. Salas*, 810 S.W.2d 456, 461 (Tex. App. – San Antonio 1991, *writ denied*).

Furthermore, it is well settled that "a person's criminal conduct is a superseding cause extinguishing liability of an alleged negligent actor." *Skipper v. U.S.*, 1 F.3d 349, 353-354 (5th Cir. 1993) citing *El Chico Corp. v. Poole*, 732 S.W.2d 306, 313 (Tex. 1987).

Clearly, there was no duty on the part of the El Paso Police Department to control the acts of Alejandro Alvarez, and there was no "special relationship" between Mrs. Alvarez and any employees involved.

F. Sovereign Immunity and its Waiver

A municipality is entitled to sovereign or governmental immunity, and waives that immunity only if liability arises under the Texas Tort Claims Act (the "Act") in only three areas: claims arising from the operation or use of motor-driven equipment, from premises defects, and the condition or use of tangible personal property.

Tex. Civ. Prac. & Rem. Code § 101.021; *University of Texas Medical Branch at Galveston v. York*, 871 S.W.2d 175, 177 (Tex. 1994).

1. Condition or Use of Tangible Personal Property

Essentially, the Act allows for a waiver of governmental immunity when injury is caused by the "use" of the property, but there must be a causal connection between the alleged such use and the injuries claimed, and the mere presence of a tangible piece of property together with some negligent act by a government employee is insufficient. *Wilkins v. State*, 716 S.W.2d 96, 98 (Tex. App. – Waco 1986, writ ref'd n.r.e.); *Marroquin v. Life Management Center for MH/MR Services*, 927 S.W.2d 228, 232 (Tex. App. – El Paso 1996, writ dism'd).

Importantly, the use of computers or telephones to communicate "information" is not a use of tangible personal property, and there is no waiver of sovereign immunity by using, misusing, or not using information. *Kassen v. Hatley*, 887 S.W.2d 4, 14 (Tex. 1994).

2. Operation or Use of Motor-driven Vehicle

As with the allegation of use or misuse of tangible personal property, the Texas Supreme Court has held that liability arising from the operation or use of a motor-driven vehicle requires a clear nexus between the injury and the actual negligent operation of the government's vehicle. *LeLeaux v. Hampshire-Fannett I.S.D.*, 839 S.W.2d 56 (Tex. 1992).

3. Method of Providing Police Protection

When the petition and the briefs are read, in their entirety, and objectively, the claim is, essentially, that the City is liable simply for failing to provide police protection. Under the Act – and specifically so – the City's tort immunity remains intact for any failure to provide, or the method of providing, police protection. Tex. Civ. Prac. & Rem. Code, § 101.055(3); *State v. Terrell*, 588 S.W.2d 784, 787 (Tex. 1979).

CONCLUSION

The U.S. Fifth Circuit Court of Appeals has reached the correct interpretation and result in this case. That decision is in complete harmony with congressional intent and the surrounding case law – including that of this Court – and the petition should be denied.

Respectfully submitted,

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